**Webco Industries, Inc. *and* United Steelworkers of America.** Case 17–CA–20143

December 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On March 20, 2000, Administrative Law Judge Jane Vandeventer issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief,[5] and the Respondent filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.

The judge found that the Respondent violated Section 8(a)(1) and (4) of the Act by filing and pursuing preempted State court lawsuits against two former employees, Eric Martin and Charley Casey, in retaliation for their participation in protected concerted activities. She found that the suits were preempted at the time they were filed, and consequently that Martin and Casey were entitled to recover any reasonable legal expenses they had incurred in defending against the suits. The judge ordered the Respondent to move to dismiss both lawsuits.

We agree with the judge that the suits were preempted and unlawful at their inception. However, for the reasons discussed below, we find that the suit against Casey is no longer preempted.

I. BACKGROUND

This case arose out of events that were the subject of an earlier case, *Webco Industries*, 334 NLRB No. 77 (2001) (*Webco II*).[6] There, the Board found that the Respondent violated the Act by, among other things, selecting a number of employees for layoff in October 1998, because of their support for the Union. Id., slip op. at 1.

Martin and Casey were two of the alleged discriminatees in *Webco II*. The Respondent argued that they were barred from seeking relief under the Act because, when they were laid off, they were given severance pay in return for signing agreements purportedly releasing the Respondent from all existing claims or liabilities, including those arising under the Act. The judge in *Webco II* rejected that argument and found that the layoffs of Martin and Casey were unlawful. He recommended that the issue of the effect of their severance pay on their backpay awards be left to compliance proceedings. Id., judge's slip op. at 18–19.

On July 19, 2001, the Board issued its decision in *Webco II*. The Board agreed with the judge that the severance agreements did not bar recovery and that Martin was unlawfully laid off. Id., slip op. at 3–4. However, the Board reversed the judge and found that Casey's layoff was not unlawful because the Respondent was unaware of his union activities. Id., slip op. at 1–2.

Meanwhile, shortly after the complaint in *Webco II* issued, the Respondent filed suits in State court against Martin and Casey.[7] Both suits alleged breach of contract, specifically, that the employees had breached the terms of the severance agreements by participating as alleged discriminatees in *Webco II*. The Respondent asked the court to award damages including the amounts of severance pay received, $1500 paid on each employee's behalf to MBC Associates, Inc. (apparently for that firm's assisting the employees in making the transition to new employment), plus interest, costs, and attorney's fees. In the alternative, the Respondent asked the court to order Martin and Casey to request the General Counsel to withdraw their names from the charges and complaints.

On May 5, the Union filed the original charge in this case. The complaint issued on August 25, alleging that the Respondent's suits were preempted and unlawful.

On September 30, the Respondent amended the suits by adding two causes of action, for unjust enrichment and for money had and received. On October 21, the Respondent moved the court to hold its contract claims in abeyance.[8]

On December 14, the United States District Court for the Northern District of Oklahoma issued an order granting the General Counsel's request for a temporary injunction under Section 10(j) and directing the Respondent to stay its suits against Martin and Casey pending the Board's decision in this case.

[5] The Charging Party Union filed a letter adopting the General Counsel's arguments and authorities.

The Respondent also called the Board's attention to the U.S. Court of Appeals for the 10th Circuit's decision in *Willmar Electric Service, v. Cooke*, 212 F.3d 533 (2000), which issued after the time for filing briefs had expired. We have taken administrative notice of that decision and find that it does not affect the result here.

[6] In a still earlier case, the Board found that the Respondent had committed several violations of the Act in response to a union organizing campaign. *Webco Industries*, 327 NLRB 172 (1998), enfd. 217 F.3d 1306 (10th Cir. 2000) (*Webco I*).

[7] The original complaint in *Webco II* issued on March 8, 1999. Martin was among the alleged discriminatees. Casey's name was included in the General Counsel's notice to amend the complaint on May 4, and was included in the amended complaint on May 11. The Respondent filed suit against Martin on May 5 and against Casey on May 19. (These are the dates alleged in the complaint in this case and admitted in the Respondent's answer. The dates stamped on the copies of the documents in evidence are illegible. We correct the dates stated in the judge's decision to the extent that they differ from those in the complaint and answer.)

[8] The judge erroneously stated that there was no record evidence that such a motion was filed. We correct the error.

## II. DISCUSSION

We agree with the judge, for the reasons stated in her decision and as further discussed below, that the Respondent's suits were preempted at their inception and were filed and maintained with a retaliatory motive. We affirm the judge's finding that the suits were unlawful. However, we find that the suit against Casey ceased to be preempted on July 19, 2001, when the Board issued its decision in *Webco II*, finding that Casey's layoff was not unlawful.

As the judge observed, the Supreme Court set forth the basic framework for preemption analysis under the Act in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). There, the Court held that conduct that is either arguably protected by Section 7 of the Act or arguably prohibited by Section 8 must be left to the Board's exclusive jurisdiction in order to avoid State interference with national labor policy. Id. at 244–245. The Court has also explained that, in determining whether a State cause of action is preempted, the critical inquiry is whether the controversy presented to the court is identical to one that could have been presented to the Board. *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 197 (1978). (Later, however, the Court indicated that this requirement is met if the plaintiff's Federal and State claims, though not identical, are the same in a fundamental respect. *Operating Engineers v. Jones*, 460 U.S. 669, 682–683 (1983).)

Not every State cause of action involving conduct arguably protected or prohibited under the Act is preempted. Thus, the Court in *Garmon* held that, if the activity is a "merely peripheral concern" of the Act, or touches interests that are "deeply rooted in local feeling and responsibility," the Court would not infer that Congress had deprived the States of jurisdiction. 359 U.S. at 243–244.

A separate question is whether, as a practical matter, the plaintiff can present his claims to the Board for adjudication. As the Court observed in *Sears, Roebuck*, supra:

> The primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the State court or the NLRB, it must be presented to the Board. But that rationale does not extend to cases in which an employer has no acceptable method of invoking, or inducing the Union to invoke, the jurisdiction of the Board. We are therefore persuaded that the primary-jurisdiction rationale does not provide a *sufficient* justification for pre-empting State jurisdiction over arguably protected conduct when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so. 436 U.S. at 202–203 (emphasis in the original; footnotes omitted).

Accordingly, when the Board could not provide the relief sought by State court plaintiffs, the Supreme Court has been unwilling to find the State cause of action preempted. See, e.g., *Sears, Roebuck*, supra (State suit to enjoin union's trespassory picketing); *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 63 (1966) (civil libel action against union); *Belknap v. Hale*, 463 U.S. 491, 510–511 (1983), (striker replacements' suit against employer for breach of contract and misrepresentation in laying them off in favor of returning strikers after promising them that they were permanent replacements).

Applying these principles to the facts of this case, we agree with the judge that the Respondent's suits were preempted. Clearly, Martin's and Casey's union activities, and their attempts to invoke the Board's processes, were arguably (indeed, actually), protected by Section 7. The Respondent's selection of them for layoff was arguably prohibited by Section 8. The Respondent's contention that the employees had waived their right to recovery under the Act thus was inextricably intertwined with both arguably protected and arguably prohibited conduct. As the judge found, from the time the Respondent filed its suits alleging breach of contract until it asked the State court to hold its contract claims in abeyance, the legal effect of the severance agreements was a central issue in the lawsuits, as it was before the Board in *Webco II*. There would be a clear potential for conflict between Federal and State adjudications, and for State interference with national labor policy, if the State suits were allowed to proceed. Therefore, under *Garmon*, the Board had exclusive jurisdiction to determine the legal effect of the severance agreements on the relief that can be granted to Martin and Casey under the Act. See *American Pacific Concrete Pipe Co.*, 292 NLRB 1261 (1989), discussed in the judge's opinion.

Moreover, the Board was in a position to provide a forum for the Respondent's State law claims, or their equivalent. As stated above, the Respondent asked the court to order Martin and Casey either to refund the moneys they received pursuant to the severance agreements or, in the alternative, to request the General Counsel to remove their names from the complaint. With respect to the alternative remedy, the Board—and only the Board—had jurisdiction to determine whether the severance agreements precluded the General Counsel from seeking relief for Martin and Casey. Thus, *only* the Board had the authority to grant this form of relief.[9]

Of course, the Board did not provide the requested alternative relief. Instead, it found that Martin and Casey did not waive their right to seek relief under the Act by signing the severance agreements. Still, while the Respondent's suits were pending, and even after they had been enjoined, the Board was in a position to provide the

[9] Indeed, the Respondent argued to the Board in *Webco II* that the agreements were binding on Martin and Casey.

equivalent of the reimbursement remedy the Respondent sought from the court, by offsetting the employees' severance pay against any backpay they might be awarded. Indeed, the judge in *Webco II* specifically stated that the effect of the severance agreements on the employees' backpay awards could be determined in compliance proceedings.[10] Contrary to the Respondent's contention, its asking the State court to hold its contract-based claims in abeyance did not change matters. Any reimbursement that might have been ordered pursuant to the Respondent's equitable claims also could have been offset against the employees' potential backpay awards.[11]

We also agree with the judge that the Respondent's State court claims do not involve matters that have traditionally been areas of State concern or that involve interests "deeply rooted in local feeling and responsibility." In the first place, the suits were originally based entirely on the fact that Martin and Casey signed agreements not to be parties to legal proceedings under the Act. The effect of those agreements on the employees' protected right to seek relief under the Act is wholly a matter of *Federal* law; it is the antithesis of areas of State concern or interests involving "local feeling and responsibility." Compare *Linn v. Plant Guard Workers*, supra (libel); *Farmer v. Carpenters*, 430 U.S. 290 (1977) (intentional infliction of emotional distress); *Sears, Roebuck & Co.*, supra (trespass).

*Belknap v. Hale*, supra, cited by the Respondent, is not to the contrary. There, the Supreme Court found that a State court suit by striker replacements against their employer for breach of contract *and misrepresentation* was not preempted by the Act.[12] Thus, unlike this case, *Belknap* involved both tort and contract claims. Moreover, in *Belknap* the Board could not give the plaintiffs the relief they sought in court. Here, as explained above, the Respondent could have sought the same relief from the Board as from the State court.

We further agree with the judge that preemption occurred on March 8 and May 11, when Martin and Casey, respectively, were named as alleged discriminatees in the complaint in *Webco II*. After those dates, any cause of action based on the employees' severance agreements fell within the Board's exclusive jurisdiction because of the potential for conflict between Federal and State adjudications. Contrary to the Respondent, it is immaterial that, at the time it brought suit, it may have genuinely believed that the agreements were enforceable. The point is that the enforceability of the agreements was a question for the Board, not for the State court. We therefore affirm the judge's finding that the suits were preempted at their inception.

We also agree with the judge that the suits were unlawful. In order to enjoin a pending lawsuit that lacks a reasonable basis in law and fact, the Board must find that the suit was filed in retaliation for the exercise of Section 7 rights. *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 748–749 (1983). However, it is not necessary to establish retaliatory motive in order to find that a *preempted* lawsuit violates Section 8(a)(1). *Federal Security, Inc.*, 336 NLRB No. 52, judge's slip op. at 5 (2001).[13] Rather, if a suit is preempted, it violates Section 8(a)(1) if it tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Manno Electric*, 321 NLRB 278, 298 (1996). See also *Bakery Workers Local 6 (Stroehmann Bakeries)*, 320 NLRB 133, 138 (1995), (union's preempted suit against Board and employer did not violate Section 8(b)(1)(A) because it did not restrain or coerce employees). And see *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000) (discovery request that was for illegal objective violated Section 8(a)(1), without regard to retaliatory motive). Similarly, although violations of Section 8(a)(4) generally require a showing of antiunion motive, the Board has indicated that such a showing is not necessary in the case of a preempted lawsuit. *Manno Electric*, 321 NLRB at 298–299. But see *American Pacific Concrete Pipe Co.*, 292 NLRB at 1262 (indicating that a showing of retaliatory motive is necessary even in the case of a preempted suit).

In any event, it is clear, as the judge found, that the Respondent filed its lawsuits with a motive to retaliate against Martin and Casey for the exercise of their Section 7 right to bring their unfair labor practice claims to the Board. As the judge pointed out, the suits explicitly alleged that the employees breached the settlement agreements by allowing the Union to file charges and allowing the General Counsel to name them in the complaint. The Respondent's Vice President, Tom Lewis, testified that the Respondent sued Martin and Casey because they vio-

[10] *Webco Industries*, 334 NLRB No. 77, judge's slip op. at 19. See also *Weldun International*, 321 NLRB 733, 734 fn. 6 (1996), modified on other grounds (mem.) 165 F.3d 28 (6th Cir. 1998); *Krist Oil*, 328 NLRB 825 fn. 3 (1999).

[11] Because the Board in *Webco II* found that Casey's layoff was not unlawful, he will not receive backpay against which his severance payments could be offset. As we explain below, we find for that reason that the suit against Casey is *no longer* preempted. But from the time the suit against Casey was filed until long after the district judge enjoined it, Casey was an alleged discriminatee and a potential backpay recipient. During that time, the Board at least potentially could have afforded the Respondent the relief it sought from Casey in State court.

[12] Inexplicably, the Respondent also relies on *Wright Electric, Inc.*, 327 NLRB 1194 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000), a case in which preemption apparently was not an issue.

[13] In footnote 5 of *Bill Johnson's*, the Supreme Court explained that

> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits . . . . Nor could it be successfully argued otherwise[.]

461 U.S. at 737, fn. 5.

lated their severance agreements by bringing Board charges. The suits thus were, by their terms, filed in retaliation for protected conduct, and the Respondent has admitted as much.

The Board in *Bill Johnson's* cases has held that when an employer sues employees or a union expressly for engaging in protected conduct, retaliatory motive is established. Thus, for example, in *J.W. Rhodes Department Stores*, 267 NLRB 381, 383 (1983), the Board found that the employer's lawsuit was filed solely to retaliate against an employee and his father for filing a Board charge, when the allegations of the suit were all based on the language in the charge and on the defendants' actions relating to its filing. See also *Phoenix Newspapers*, 294 NLRB 47, 50 (1989); *BE&K Construction Co.*, 329 NLRB 717, 726-727 (1999), enfd. 246 F.3d 619 (6th Cir. 2001); *Petrochem Insulation, Inc.*, 330 NLRB 47, 50 (1999), enfd. 240 F.3d 26 (D.C. Cir. 2001).

And there is additional evidence of retaliatory motive here. First, it was unnecessary for the Respondent to file its lawsuits, because, as we have explained, it could have petitioned the Board for the relief it sought. That the Respondent chose to hale the employees into State court, when the Board could have provided the remedies it sought, is further evidence of retaliation. Second, after the General Counsel issued the complaint in this case, the Respondent actually added causes of action to its State court suits, even though the issue of the legal effect of the severance agreements was still pending before the judge in *Webco II*. This casting about for additional theories on which to sue Martin and Casey, when its suits had already been alleged to be unlawful, also suggests retaliatory motive.

At least one court has rejected the Board's view, stated above, that retaliatory motive is established when an employer's suit is expressly based on protected conduct. The D.C. Circuit has stated that all employer suits seeking to recover damages caused by union activity are, by definition, filed in response to that activity, and therefore, under the Board's reasoning, *Bill Johnson's* requirement of retaliatory motive is reduced to a tautology. *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 32 (D.C. Cir. 2001).

We respectfully disagree. It is not true by definition that all employer suits allege protected conduct as the basis for the cause of action. An employer that wanted to retaliate against an employee for spearheading a union organizing drive could sue him on a pretext, say, that he embezzled company funds. If the suit proved baseless or meritless, the Board could find the suit unlawful if it found that the employer's real motive was to retaliate against the employee for his organizing activity. In that situation, the General Counsel would have to prove retaliatory motive, because the true motive would not be evident on the face of the complaint. However, when a suit explicitly complains of protected conduct, the employer has essentially admitted retaliatory motive.[14]

For all the reasons discussed, we affirm the judge's findings that the Respondent's State court lawsuits were preempted at the outset and that the Respondent violated Section 8(a)(4) and (1) by filing and maintaining the suits. And with regard to Martin, whose layoff the Board found unlawful in *Webco II*, we adopt the judge's recommended remedy. Thus, we shall order the Respondent to cease and desist from maintaining its suit against Martin, move for its dismissal, and reimburse him for his legal expenses. The effect of his severance agreement on his backpay award can be determined in compliance proceedings.

Casey is a different story. After the judge issued her decision in this case, the Board in *Webco II* found that Casey's layoff was not unlawful. Therefore, as stated above, Casey will not receive backpay against which his severance pay could be offset. Thus, although it was once possible that the Board would provide the reimbursement relief the Respondent sought in its State court suit (as in Martin's case), we can no longer do so. And, of course, the Board has also adjudicated, adversely to the Respondent, the issue of the validity of Casey's severance agreement. Accordingly, the Board has now decided all of the issues arising under the Act pertaining to Casey. The Respondent's equitable claims remain, but the Board lacks jurisdiction over them and has no means of granting the relief the Respondent seeks. In short, there is no longer any risk of conflicting decisions under Federal and State law, and the resolution of the Respondent's equitable causes of action must be left to the State court.[15]

[14] Our reasoning may be illustrated by reference to what often happens outside the context of employer lawsuits. Employers sometimes discipline or discharge employees, ostensibly for some violation of work rules, e.g., excessive tardiness. The General Counsel may be able to prove, however, that the stated reason is pretextual, and that the real reason for the employer's action was to retaliate against the employee for being a vocal union supporter. But on those rare occasions when an employer states forthrightly that he fired an employee because of his protected conduct, the Board does not look further for retaliatory motive, because the motive has been admitted. By the same logic, when an employer sues an employee or a union expressly for engaging in protected conduct, there is no need to look further for a retaliatory motive, because the motive is plain on the face of the complaint.

[15] See *Hanna Mining Co. v. Marine Engineers Beneficial Assoc.*, 382 U.S. 181, (1965). There, the Supreme Court held that an employer's State court suit to enjoin picketing aimed at causing the employer to recognize the union as the representative of certain individuals was not preempted. The Board had ruled that the individuals in question were statutory supervisors not protected by the Act, and the General Counsel had dismissed charges alleging that the union's conduct was unlawful. The effect of those decisions was that the Board could afford the employer no relief. In those circumstances, the Court ruled that the State suit could go forward. In so holding, the Court observed: "Thus, so far as *Garmon* may proceed on the view that the opportunity belongs to the Board wherever it and the State offer duplicate relief, it has limited application to the present facts." Id. at 194.

We therefore find that, although the Respondent's suit against Casey was preempted when filed, it lost its preempted character on July 19, 2001, when the Board in *Webco II* found that his layoff was not unlawful. Consequently, the Respondent is now free to reinstate the suit insofar as it alleges equitable claims. We shall modify the provision of the judge's recommended Order involving the Respondent's State lawsuit against Casey to require that the Respondent move for dismissal of only that part of its lawsuit that involves a breach of contract action.[16]

Our concurring colleague would also allow the Respondent to pursue its breach of contract claims in State court. He apparently bases his position on the fact that the Board in *Webco II* found only that the severance agreements did not bar the employees' 8(a)(3) claims, not that the agreements were unlawful. He thus reasons that there is nothing in the Board's decision that would preclude a claim based on breach of contract.

We disagree. The Board's determination in *Webco II* absolutely precludes a breach of contract action. The Board found that the severance agreements were *ineffective*, 334 NLRB No. 77, slip op. at 3–4 (or, as the administrative law judge in that case put it, "null and void," id., judge's slip op. at 19). The Board, in other words, has already authoritatively held that the severance agreements did not constitute enforceable contracts, at least insofar as they purported to bar the employees from seeking relief before the Board. The State court could not find a breach of contract without first finding that there was a contract, and any such finding would be inconsistent with the Board's holding in *Webco II*. Therefore, the Respondent's breach of contract claims remain preempted.

ORDER

The National Labor Relations Board orders that the Respondent, Webco Industries, Inc., Sand Springs, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Filing and maintaining lawsuits with causes of action that are preempted by the Act and are motivated to retaliate against activity protected by Section 7 of the Act.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Move for dismissal of the proceedings in *Webco Industries, Inc. v. Martin* (Creek County District Court Case No. CJ-99-329).

(b) Reimburse Eric Martin for all reasonable legal expenses incurred in the defense of the Respondent's lawsuit against him, in the manner provided in the remedy section of the judge's decision.

(c) Move for dismissal of that portion of the proceedings in *Webco Industries, Inc. v. Casey* (Creek County District Court Case No. CJ-99-360), that involves the breach of contract action.

(d) Reimburse Charley Casey for all reasonable legal expenses incurred through July 19, 2001, in the defense of the Respondent's lawsuit against him, in the manner provided in the remedy section of the judge's decision.

(e) Within 14 days after service by the Region, post at its facility at Sand Springs, Oklahoma, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 5, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

In contrast, so long as the Board is able to afford the employer relief, preemption of the employer's lawsuit will continue. Thus, in *American Pacific Concrete Pipe Co.*, 292 NLRB 1261 (1989), the Board held that the employer's lawsuit was preempted where the employer's claims against an employee (pursuant to a private settlement that released the employer from liability covering backpay owed the employee), could be addressed in the backpay proceeding involving the employee. In the backpay proceeding, the Board held that it would honor the private agreement and dismissed the compliance specification pertaining to the employee. *American Pacific Concrete Pipe Co.*, 290 NLRB 623 (1988).

[16] It may seem anomalous to hold that a State court suit filed with retaliatory motive may nonetheless proceed, but it is not. The Supreme Court in *Bill Johnson's* specifically held that the Board should not enjoin a pending State court suit, even one filed with retaliatory motive, unless it lacks a reasonable basis in law and fact. 461 U.S. at 743–744. We cannot say that the Respondent's State law equitable claims lack a reasonable basis (and we have not been asked to make such a finding in any event). Accordingly, there is no reason why the Respondent should not take up the cudgels again if it wishes to do so. Of course, as the *Bill Johnson's* Court also held, if judgment goes against the Respondent in State court, the Board may find that the suit is unlawful. Id. at 747.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C., December 20, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, concurring and dissenting in part.

1. In *Webco II*, 334 NLRB No. 77, I dissented from the Board's finding that the Respondent's layoff of employee Martin was unlawful. I would have honored the severance agreement between Respondent and Martin, and therefore I would have dismissed the complaint's allegations regarding Martin. I adhere to my dissent. Nonetheless, I agree, essentially for reasons set forth in the majority opinion, that the Respondent's lawsuit based on the severance agreement was preempted from the inception. That is, I agree that issues concerning the validity and effect of the severance agreement were exclusively for the Board to decide. Although I disagree with the Board's decision, I agree that it was within the Board's exclusive province to make that decision.

2. With respect to retaliatory motive, I agree with the D.C. Circuit that a lawsuit containing allegations against protected activity does not ipso facto establish that the motive was to retaliate against that activity.[18] However, I agree that the Respondent's lawsuit here had a retaliatory motive. In this regard, I note that Respondent could, and did, seek relief before the Board. It could, and did, argue that the severance agreement is a defense to the allegations of unfair labor practices. In addition, it is free to argue in compliance proceedings that the severance payment should be an offset to backpay. Further, Respondent is free to raise these matters before any court that may review the Board's decision. In short, there was no compelling need to sue the employees.

In sum, since the lawsuits against the employee were aimed at Section 7 activity (resort to NLRB), the lawsuits would predictably chill that activity, and there was no need to file them. In these circumstances, I agree that there was a retaliatory motive.

3. With respect to Casey, I agree that the lawsuit against him was preempted. As noted above, issues concerning the validity and effect of the severance agreement were exclusively for the Board to decide. However, these issues are no longer before the Board. That is, the Board found no violation as to Casey, and thus there is no longer an issue as to the validity and effect of the severance agreement. Accordingly, it would appear that Respondent would no longer be preempted from seeking to recoup the money that it paid to Casey.

My colleagues agree that Respondent can seek to recoup this money. However, they say that Respondent can only pursue an equitable claim of "unjust enrichment/money had and received." I would permit Respondent to also pursue a legal claim of breach of contract. The Board did not find the severance agreement unlawful. It simply held that the agreement did not bar the 8(a)(3) claim. Thus, there is nothing in the Board's opinion to preclude a claim of breach of contract.[19]

Dated, Washington, D.C., December 20, 2001

Peter J. Hurtgen, Chairman

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT file or maintain lawsuits with causes of action that are preempted by the Act and are motivated to retaliate against activity protected by Section 7 of the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL move for dismissal of the proceedings in *Webco Industries, Inc. v. Martin* (Creek County District Court Case No. CJ-99-329).

WE WILL reimburse Eric Martin for all reasonable legal expenses incurred in the defense of our lawsuit against him.

[18] *Petrochem Insulation v. NLRB*, 240 F.3d 26, 32.

[19] Of course, if Respondent loses its case, the General Counsel would be free to then allege that the suit was non-meritorious and retaliatory. However, that issue is not now before the Board.

WE WILL move for dismissal of that portion of the proceedings in *Webco Industries, Inc. v. Casey* (Creek County District Court Case No. CJ-99-360), that involves the breach of contract action.

WE WILL reimburse Charley Casey for all reasonable legal expenses incurred through July 19, 2001, in the defense of our lawsuit against him.

WEBCO INDUSTRIES, INC.

*Francis A. Molenda*, for General Counsel.
*Shane C. Youtz (Youngdahl and Sadin)*, Albuquerque, New Mexico, for Charging Party.
*David E. Strecker and James E. Erwin (Strecker and Associates)*, Tulsa, Oklahoma, for Respondent.

## DECISION

### STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This case was tried on October 22, 1999, in Tulsa, Oklahoma. The complaint alleges Respondent violated Section 8(a)(1) and (4) of the Act by filing lawsuits in State court against two individuals because they participated in the filing of charges before the National Labor Relations Board (Board). The Respondent filed an answer denying the essential allegations in the complaint. After trial, the parties filed briefs which I have considered.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent is a corporation with an office and place of business in Sand Springs, Oklahoma, where it is engaged in the manufacture and distribution of steel tubing. During a representative 1-year period, Respondent sold and shipped from its Sand Springs facility goods valued in excess of $50,000 directly to points outside the State of Oklahoma. Accordingly, I find, as Respondent admits, it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find the Charging Party (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

#### II. UNFAIR LABOR PRACTICES

##### *A. The Facts*

###### 1. Background

Respondent employed some 275 people at its Sand Springs facility as of October 1998. On October 7, 1998, Respondent laid off 53 of its employees. A prior unfair labor practice case concerning these layoffs was tried before Administrative Law Judge Michael D. Stevenson on 5 days between May 11 and June 9, 1999.[1] Judge Stevenson issued his decision (JD), on September 17,[2] finding, inter alia, Respondent had violated Section 8(a)(3) of the Act by terminating 1 employee and by laying off 11 employees, including Eric Martin and Charley Casey. In light of a prior case involving Respondent,[3] Judge Stevenson recommended a broad order be issued. At present, exceptions to Judge Stevenson's decision are pending before the Board. Certain facts found by Judge Stevenson are summarized here.

Most of the laid off employees were offered a severance payment on condition they sign a "severance agreement/release." The agreements provided for the payment of varying amounts of severance pay as well as a provision that the employee could never work for Respondent again. Employees further undertook not to challenge their layoffs in any forum, whether State or Federal. Employees who did not enter into the severance agreements were also barred from rehire by Respondent. Judge Stevenson found this latter provision was company policy, although it was not generally known to employees.

There was an unsuccessful organizing drive by the Union in early 1997. In the summer of 1998, there was a renewed organizing effort. When a layoff became necessary in October 1998, Judge Stevenson found, Respondent targeted certain union supporters for layoff. Judge Stevenson found considerable evidence of anti-union animus and targeting of union supporters by Respondent. He specifically found Eric Martin and Charley Casey had engaged in union activities, Respondent knew of these activities, and Respondent chose them, among others, for layoff because of their union activities. JD at 21.

One defense raised by Respondent before Judge Stevenson with respect to Martin and Casey was their execution of severance agreements/releases. Respondent claimed the two employees' execution of these agreements should bar any remedy for them. After a detailed analysis of this contention (JD at 22–24), Judge Stevenson rejected Respondent's defense, and left to the compliance stage the determination as to what effect, if any, the two employees' receipt of certain amounts of money might have on their back pay entitlement. Judge Stevenson ended his analysis with the statement:

> I find that Respondent has failed to prove its affirmative defense and as to Martin and Casey, the severance agreements/releases are null and void. Fn.
>
> [Text of footnote:] At pgs. 4–7, Resp. Ex. 94(a), Respondent discussed its view of whether the severance agreements are valid under Federal law and Oklahoma law. I see no reason to enter into that debate since the agreements are not valid under Board law. JD at 24.

###### 2. The instant charges

Most of the facts in the instant case are undisputed. Martin's name was included in the first amended charge filed by the Union on December 29, 1998, and was included in the initial complaint issued in the prior case on March 8. Casey's name was included in the third amended charge filed by the Union on April 30, and was included in the General Counsel's Notice to Amend the Complaint issued on May 4. The actual amendment to the complaint adding Casey's name was made at the trial before Judge Stevenson which began on May 11.

[1] All dates hereafter are in 1999, unless otherwise specified.

[2] *Webco Industries, Inc.*, JD(SF) 78–99 (Sept. 17, 1999).

[3] *Webco Industries, Inc.*, 327 NLRB No. 47 (1999).

On May 5, Respondent filed a lawsuit in State court against employee Eric Martin, and on May 13, filed a similar lawsuit against employee Charley Casey. Each of the lawsuits alleged two causes of action for "breach of contract," one alleging the named employee had breached the severance agreement by allowing himself to be named in the Union's NLRB charge, and the second claiming breach by the employee's allowing the NLRB to seek a reinstatement remedy for him. The employees, by their counsel, moved to dismiss both lawsuits on grounds of preemption.

Charges were filed by the Union on May 5 alleging that the State court lawsuits filed by Respondent against individual employees violated Section 8(a)(1) and (4) of the Act. The Regional Director for Region 17 issued the instant complaint on August 25.

The trial before Judge Stevenson in the prior proceeding began on May 11. On May 20, Federal District Court Judge Sven Erik Holmes issued an order temporarily enjoining Respondent from the conduct which was the subject of the trial before Judge Stevenson. As noted above, Judge Stevenson issued his decision on September 17 finding, inter alia, the severance agreements null and void. On September 30, Respondent filed amended petitions in its State court lawsuits against Martin and Casey adding two additional causes of action, one for "money had and received" and one for "unjust enrichment." On October 21, Respondent moved the State court to hold in abeyance its first two causes of action for "breach of contract." On October 20, the Region filed a petition for temporary injunctive relief under Section 10(j) of the Act in Federal District Court concerning the lawsuits herein.

Vice President of Operations Tom Lewis testified at the instant hearing on October 22. He testified he had authorized the filing of lawsuits against employees Martin and Casey as well as seven other individuals.[4] In response to questions by the Union's counsel, Lewis testified he made the decision to file these lawsuits because the employees had violated their severance agreements by bringing NLRB charges. Lewis also testified that Respondent filed lawsuits against the individuals in order to "stay out of court."

Subsequent to the trial herein, on December 14, District Court Judge Sven Erik Holmes issued an order granting the temporary injunction and ordering Respondent to stay its State court lawsuits against Martin and Casey until such time as the instant proceeding before the Board is concluded. The judge's order recites that at the injunction hearing on December 9, Respondent's counsel represented that Respondent had filed motions to dismiss the "breach of contract" causes of action from both lawsuits. No evidence of such motions was submitted by the parties for inclusion in the instant record.

The General Counsel urges Respondent's State court lawsuits against Martin and Casey are preempted and therefore, under *Loehmann's Plaza*, 305 NLRB 663 (1991), violate Section 8(a)(1) and (4).

Respondent argues the proper precedent is found in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), which requires the Board to await the outcome of the State court proceedings in order to learn whether the lawsuits are meritorious. Then, only if the lawsuits are (1) ultimately found not meritorious and (2) originally filed with a retaliatory motive may the Board find the lawsuits violate Section 8(a)(1) and (4).

### *B. Discussion and Analysis*

#### 1. The prior case

Initially, it should be noted that my reliance on the findings and decision of Judge Stevenson in the prior related case is consistent with Board practice and procedure. *The Grand Rapids Press of Booth Newspapers, Inc.*, 327 NLRB No. 72 (1998), slip op. at 1. In a footnote to its brief, Respondent has repeated the waiver defense which it urged before Judge Stevenson. To the extent Respondent is urging that I reexamine this contention and decide it contrary to the findings and conclusions of Judge Stevenson, I decline to do so.

#### 2. Preemption

##### *a. Supreme Court precedent*

Respondent's major argument concerns the application of *Bill Johnson's Restaurants* to its State court lawsuits. Respondent has put the cart before the horse. As Board precedent teaches, the threshold inquiry is whether preemption applies. *American Pacific Concrete Pipe Co.*, 292 NLRB 1261, 1262 (1989). Only if preemption is *not* found does the analysis even reach the question of the application of *Bill Johnson's Restaurants*. *Bill Johnson's Restaurants*, above, at footnote 5. See also, e.g., *Manno Electric, Inc.*, 321 NLRB 278, 297–298 (1996); *Be-Lo Stores*, 318 NLRB 1, 2, 12 (1991).

Turning to familiar Supreme Court preemption cases, the factors to be addressed have been often set forth. See, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244–245 (1959). The first focus has been described as the conflict or potential for conflict between State and Federal adjudications, and the extent to which this interferes with or might interfere with the national labor policy; this inquiry has often been couched in terms of conduct which is "actually or arguably either prohibited or protected by the Act." The similarity or identity of the issues to be decided in each forum is part of the analysis.

The second focus is the nature of the State's interest in the subject matter, i.e., whether the matter is one which has traditionally been an area of State concern and which "touches interests deeply rooted in local feeling and responsibility." In certain cases where the State's interest is found to be significant, and the potential for conflict between the State and Federal regulation low, preemption has not been found. In well-known preemption cases, these State interests have most often been causes of action which sound in tort, such as trespass, libel, slander, misrepresentation, and intentional infliction of emotional distress, or actions which involve the police power of the State, such as criminal trespass. See, e.g., *Bill Johnson's Restaurants*, above; *Linn v. United Plant Guard Workers*, Local 114, 383 U.S. 53 (1966).

Respondent did not cite any case which sounded only in contract, and which was not preempted. The one case which Respondent was able to cite involved a contract claim *joined* with a misrepresentation claim. In *Belknap v. Hale*, 463 U. S. 491 (1983), the State's interest was deemed to be paramount and the interference with the Federal scheme to be peripheral. There a group of employees who had been hired as striker replacements sued their erstwhile employer in Kentucky State court for mis-

[4] The seven other employees settled their individual lawsuits with Respondent as well as settling their portion of the NLRB charges filed by the Union. Judge Stevenson granted the General Counsel's motion to amend their names out of the prior case.

representation and breach of contract. They contended they had been promised permanent employment, but the strikers whom they had been hired to replace were on a strike which was alleged to be an unfair labor practice strike in Board charges. When the employer settled the Board charges, it reinstated the striking employees, displacing the permanent replacements. In deciding that the employees, who were referred to as "innocent third parties" by the Court, could maintain their State court lawsuit against the employer, the majority's opinion did not distinguish between the two causes of action, misrepresentation, which sounds in tort, and breach of contract, but referred to them together. Therefore, in analyzing the State's interest, the Court was assessing both causes of action as a whole. There is no indication as to whether the Court's decision would have been the same had the case involved *only* a contract claim.

*Belknap v. Hale* appears to be an anomalous case, notable for having been distinguished more often than followed by Federal circuit courts. It is distinguishable from the instant case as well, first because the plaintiffs were "innocent third parties," rather than themselves being participants in Board proceedings, and second because a tort cause of action was one of the two claims which had been filed in State court, thereby raising the State's interest to a higher level under traditional preemption analysis. I find Respondent's reliance on *Belknap v. Hale* unpersuasive.

*b. Board precedent*

In *Loehmann's Plaza*, above, the Board held that a respondent who secured a State court injunction against picketing and hand-billing which it held protected had violated Section 8(a)(1) of the Act by pursuing its State court lawsuit. The issue of picketing and hand-billing on private property had long been a thorny issue. As will be discussed in more detail below, the Board found preemption occurred at the time the Board issued a complaint alleging the enjoined conduct was protected.

Prior to its decision in *Loehmann's Plaza*, above, the Board dealt with a lawsuit much like the ones at issue here in *American Pacific Concrete Pipe Co.*, above. There the Board found a respondent violated Section 8(a)(1) and (4) of the Act when it filed a complaint against an employee who had been named as a discriminatee entitled to backpay in a backpay specification. Even though the employee's private settlement was found to satisfy the Board's criteria for non-Board settlements, and the employee was not, in fact, awarded any backpay in the underlying proceeding, the Board found respondent's lawsuit seeking money damages, including litigation costs and punitive damages, was preempted by Federal law. The Board also found that the respondent had acted with a retaliatory motive. Relying upon the language of the pleadings themselves, as well as the timing of the lawsuit, which was filed on the day before the backpay hearing was scheduled to begin, to find a retaliatory motive, the Board stated:

> The Respondent's suit, in which the legal effect of Roland's private agreement would be a central issue, seeks to adjudicate many of the same issues involved in the backpay controversy. [footnote omitted.] Therefore, the Respondent's suit is preempted by Federal law.

Likewise, in the instant case, the legal effect of the two employees' private agreements would be a central issue in Respondent's lawsuits. Not only are these the same issues that would be involved in the Board's determination of backpay here, but Judge Stevenson has already ruled these agreements invalid under Board law. Certainly a State court finding that the agreements were valid or formed the basis for a finding in Respondent's favor by the State courts would be a direct conflict with Federal law. Thus the first inquiry in preemption cases, "whether there exists the potential for conflict" between the Federal and State adjudications, is answered in the affirmative.

The second inquiry, whether the contract and contract–related causes of action pled by Respondent in its State court lawsuits are central to State interests must also be answered in the negative. There is little or no legal support for a finding that a breach of contract claim is the type of controversy which touches "interests deeply rooted in local feeling and responsibility." While Respondent has argued that its "equitable" causes of action differ from the "breach of contract" claims and are somehow more central to State concerns, I find this argument unconvincing. The pleadings themselves show that these second two causes of action must necessarily depend on reference to and rulings concerning the same agreements which form the basis of its breach of contract causes of action. As shown by the precedent cited above, suits sounding in contract are not held to be so locally based and so vital to the states' interests as to preclude preemption.

To the extent retaliatory motive is an essential element of a violation under *American Pacific Concrete Pipe Co.*, it has been shown to exist here. The pleadings themselves state that the "breach" by the employees was their participation in the Board charges, permitting themselves to be named in the complaint and permitting the General Counsel to seek reinstatement for them. If this were not sufficiently clear, Vice President Lewis testified Respondent decided to sue Martin and Casey because they had violated their severance agreements by bringing Board charges. The timing of Respondent's lawsuits, following within weeks or days of the complaint allegations in each case, and filed just before and during the trial of those complaint allegations, also demonstrates Respondent acted with a retaliatory motive. *American Pacific Concrete Pipe Co.*, above.

*3. The Remedy—When did preemption occur?*

While the General Counsel requested a *Loehmann's Plaza* remedy, i.e., reimbursement of legal fees incurred only after the issuance of a complaint,[5] I have instead ordered the type of remedy ordered by the Board in *American Pacific Concrete Pipe Co.* Because the remedy in *Loehmann's Plaza* was specifically limited to suits involving State court lawsuits regarding hand-billing and picketing activity, I deem it inapplicable to the instant case. More apposite is the situation in *American Pacific Concrete Pipe Co.*, where the lawsuit was similar to the ones here, involving as it did a purported "settlement" of backpay liability, a lawsuit filed near the time of a previous Board trial, and a retaliatory motive on the part of the respondent.

That the Board did not, in *Loehmann's Plaza*, intend to modify its remedy in *all* cases involving State court lawsuits which violate Section 8(a)(1) of the Act, but only in those involving picketing and hand-billing at or near a respondent's premises, is shown by the fact that cases decided after *Loehmann's Plaza* where the remedy has been so limited have involved picketing

[5] 305 NLRB at 669–670.

and hand-billing on private property. See, e.g., *Riesback Food Markets, Inc.*, 315 NLRB 940, 944 (1994), and *Davis Supermarkets, Inc.*, 306 NLRB 426 (1992). Other types of cases—those not involving picketing and/or hand-billing on private property—have continued to be accorded the traditional remedy of reimbursement for all legal expenses incurred in defending the unlawful lawsuit. *LP Enterprises*, 314 NLRB 580, 582 (1994), (State court lawsuit for malicious prosecution where issue of preemption not litigated).

An additional ground for ordering this remedy is found in the *Loehmann's Plaza* decision itself. The Board found that in cases involving picketing and hand-billing on private property, preemption occurred at least as of the time the General Counsel issued a complaint which would make clear the conduct which was the subject of Board jurisdiction.[6] The facts in *Loehmann's Plaza* differ from those in the instant case, since in that case the complaint alleging that the hand-billing activity was protected by the Act was the same complaint which alleged the lawsuit filed to enjoin that activity was unlawful. This fact creates some difficulty in interpreting the language of that case when applying it to cases in which the complaint covering the alleged protected conduct and the complaint alleging the lawsuit are issued on different dates. There is also a distinction, as noted above, between cases involving hand-billing and/or picketing and other types of conduct.

What is clear, however, is that the Board in *Loehmann's Plaza* held that preemption occurs when the General Counsel issues a complaint alleging conduct protected by the Act has been interfered with. In the *Loehmann's Plaza* case, the lawsuit itself was the interference with protected rights alleged to be unlawful. In the instant case, the layoffs of employees because of their union and protected activities was the interference alleged to be unlawful. Therefore, the dates upon which preemption occurred in the instant case are the dates of the complaint allegations concerning the layoffs, not the complaint concerning the lawsuit. Respondent had notice of the allegations concerning the layoffs as of the issuance of the complaint on March 8 for Martin and as of the amendment of the complaint on May 11 for Casey.

Applying that principle to this case, the complaint naming Martin issued on March 8, and the notice of amendment to the complaint naming Casey was dated May 4. The actual complaint amendment with respect to Casey was made on May 11, on the first day of the hearing. I find that preemption occurred on March 8 with respect to the allegation regarding Martin, and on May 11 with respect to the allegation regarding Casey. Respondent's lawsuit against Martin was filed on May 3, 8 weeks after his layoff was alleged in the complaint. Its lawsuit against Casey was filed on May 13, 2 days after his layoff was alleged in the amendment to the complaint. Thus, in both instances, Respondent's lawsuits were filed *after* the complaint had issued alleging violations of Section 8(a)(3) with respect to the layoffs of Martin and Casey, and *after* preemption had occurred, and were thus unlawful at their inception. It would therefore be inequitable to limit the remedy to legal expenses after August 25, and I do not do so. I will recommend Respondent reimburse both individuals for their legal expenses incurred in defending against its lawsuits beginning on the dates Respondent filed the suits. *LP Enterprises*, above; *American Pacific Concrete Pipe Co.*, above.

[6] 305 NLRB AT 669–670.

## CONCLUSIONS OF LAW

By its filing and pursuit of State court lawsuits against Eric Martin and Charley Casey, Respondent has violated Section 8(a)(1) and (4) of the Act.

## THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act. I recommend that Respondent cease and desist prosecuting and move for dismissal of its State court lawsuits.

In order to place the individuals in the position they would have been in absent Respondent's unlawful conduct, I recommend that it be required to make Martin and Casey whole for all reasonable legal expenses incurred in the defense of the lawsuits, plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend that Respondent be ordered to remove from the employment records of Martin and Casey any notations relating to the unlawful action taken against them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

## ORDER

The Respondent, Webco Industries, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prosecuting State court lawsuits against Eric Martin, styled as *Webco v. Martin* (Creek County District Court Case No. CJ–99–329), and against Charley Casey, styled as *Webco v. Casey* (Creek County District Court Case No. CJ–99–360).

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[8]

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Move for dismissal of the proceedings in *Webco v. Martin* (Creek County District Court Case No. CJ–99–329), and *Webco v. Casey* (Creek County District Court Case No. CJ–99–360.

(b) Reimburse Eric Martin and Charley Casey for all reasonable legal expenses, as provided in the remedy section of this decision, incurred in the defense of Respondent's lawsuits against them.

(c) Within 14 days after service by the Region, post at its facility in Sand Springs, Oklahoma, and all other places where notices customarily are posted, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] For the reasons enumerated by Judge Stevenson in his decision, I am recommending that a broad order be issued.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 3, 1999.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT prosecute our State court lawsuits styled as *Webco v. Martin* (Creek County District Court Case No. CJ–99–329), and *Webco v. Casey* (Creek County District Court Case No. CJ–99–360).

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights.

WE WILL move to dismiss the lawsuits styled *Webco v. Martin* (Creek County District Court Case No. CJ–99–329), and *Webco v. Casey* (Creek County District Court Case No. CJ–99–360).

WE WILL reimburse Eric Martin and Charley Casey for all reasonable legal expenses incurred in the defense of our lawsuits against them, plus interest.

WEBCO INDUSTRIES, INC.